

STATE OF MICHIGAN
COURT OF APPEALS

KEITH RADZOM and SUSAN RADZOM,

Plaintiffs-Appellees,

v

CITY OF RICHMOND,

Defendant-Appellant.

UNPUBLISHED

June 18, 2015

No. 322066

Macomb Circuit Court

LC No. 2013-002948-CK

Before: MARKEY, P.J., and OWENS and GLEICHER, JJ.

PER CURIAM.

Based on a review of the pleadings alone, the circuit court denied defendant City of Richmond's motion to summarily dismiss plaintiffs Keith and Susan Radzom's negligence action arising from a sewer backup on their property. Plaintiffs' complaint recited only the elements necessary to plead a claim in avoidance of governmental immunity as outlined in MCL 691.1417. Notably absent were any facts placing the elements in context. Accordingly, we vacate the circuit court's denial of defendant's motion for summary disposition of plaintiffs' negligence claims. On remand, the circuit court shall permit plaintiffs to file an amended complaint setting forth the factual details underlying their legal allegations.

I. BACKGROUND

Plaintiffs own a home in Richmond. On February 19, 2013, sewage backed up "at the property," causing unspecified damage. Plaintiffs notified the City of Richmond and the City's "employees" allegedly "orally acknowledged responsibility." In July 2013, plaintiffs filed suit against the City, asserting claims of breach of contract, negligence, and trespass. In the negligence count, plaintiffs alleged:

13. Defendant had a common law or statutory duty to provide sewer services to Plaintiffs in a reasonably prudent manner including in a manner that would not cause there to be sewage that emanated from Defendant's system.
14. Defendant breached those duties by allowing its system to cause a sewage back-up into Plaintiffs' home resulting in various damages.
15. Defendant breached its duties in several ways including but not limited to:

a. Failing to properly maintain its system including periodic inspections designed to discover any defects in the system.

b. Failing to discover and correct the defect that caused Plaintiffs harm.

c. Failing to honor the promises of its employees who admitted responsibility for the damages.

The City quickly filed an answer to the complaint but waited until March 21, 2014, to file a summary disposition motion citing the insufficiency of the allegations raised in the complaint. The City relied upon MCL 691.1417, which creates the sewage disposal system event exception to governmental immunity. MCL 691.1417(2) grants governmental agencies immunity “from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency.”¹ MCL 691.1417(3) describes the elements a plaintiff must establish to avoid governmental immunity:

If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:

(a) The governmental agency was an appropriate governmental agency.

(b) The sewage disposal system had a defect.

(c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.

(d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.

(e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

¹ Plaintiffs attempt to avoid application of governmental immunity principles by refusing to “concede[]” that the operation of the sewer system in this case was a governmental function. The circuit court acknowledged plaintiffs’ assertion that the City had sought to privatize this service. We pass no judgment on the legal effect of privatization. The services in this case had not been privatized at the time of plaintiffs’ suit, however, making this argument completely irrelevant.

In its summary disposition motion, the City conceded the existence of a triggering sewage disposal system event and that it is an appropriate governmental agency. The City challenged the sufficiency of the complaint, however, in failing to allege (1) a defect, (2) of which the City knew or should have known, (3) that the City failed to remedy, and (4) which proximately caused plaintiffs' damages. The City described the complaint as "devoid of any allegations of fact" necessary to support plaintiffs' claims in avoidance of immunity.

In their response, plaintiffs suggested that some discovery had occurred. Plaintiffs supplied the circuit court with video footage of an inspection of the sewer line, showing deposits of an unidentified material blocking the pipe. This blockage constituted the defect in the sewer system, plaintiffs contended. Plaintiff Keith Radzom included an affidavit outlining his observations from the video. Mr. Radzom made a statement of fact: "The cause of the blockage was the buildup of mineral deposits in the sewer system as shown in the video provided by Defendant." Mr. Radzom also made a statement regarding the cause of the problem: "Based upon my common knowledge and basic biology and chemistry, I believe that the buildup of the mineral deposits occurred over a lengthy period of time." Mr. Radzom further averred that the City had "never examined the sewer system in the area of [his] home" as far as he knew, and that "[h]ad any periodic maintenance or inspections occurred," the City could have discovered and remedied the problem.²

Without the benefit of oral argument, the circuit court denied the City's motion to dismiss the breach-of-contract claim, but granted the motion in relation to plaintiffs' trespass claim. Neither party challenges those rulings.³ Relevant to this appeal, the circuit court rejected the City's bid to dispose of the negligence claim. The court did not consider the video evidence or Mr. Radzom's affidavit, focusing solely on the contents of the complaint. In doing so, the court ruled:

Plaintiffs' complaint alleges defendant's sewer system had a defect. Verified Complaint, ¶ 15(b). This allegation satisfies MCL 691.14[1]7(3)(b).

Plaintiffs' complaint alleges defendant failed to conduct periodic inspections to discover the defect. Verified Complaint, ¶ 15(a). While inartfully worded, this allegation satisfies MCL 691.14[1]7(3)(c).

Plaintiffs' complaint alleges defendant failed to properly maintain the sewer system. Verified Complaint, ¶ 15(a). While also inartfully worded, this allegation is sufficient to satisfy MCL 691.14[1]7(3)(d).

² The City challenges the admissibility of Mr. Radzom's affidavit. As the circuit court did not consider this evidence, we need not reach this issue.

³ Plaintiffs complain of the circuit court's dismissal of their trespass claim in their brief, but have not filed a cross-appeal necessary for our review.

Plaintiffs' complaint alleges defendant's employees admitted responsibility for the backup. Verified Complaint, ¶ 15(c). This allegation satisfies MCL 691.14[1]7(3)(e).

This appeal followed.

II. ANALYSIS

The City raised its motion under MCR 2.116(C)(7), asserting that governmental immunity barred plaintiffs' negligence claim. See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). A plaintiff suing a governmental entity must plead his or her claims in avoidance of immunity from the start. *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006). "To be effective, such pleading[s] must state a claim that fits within a statutory exception to immunity" *Id.* When reviewing the pleadings, the court must accept the plaintiff's well-pleaded factual allegations as true and construe them in the plaintiff's favor. *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009). Generally, when the plaintiff submits affidavits or other admissible evidence, the reviewing court must consider that evidence as well. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). The circuit court did not consider the video evidence or Mr. Radzom's affidavit, treating the motion like one brought under MCR 2.118(C)(8), i.e., challenging the sufficiency of the complaint standing alone.

The circuit court found plaintiffs' complaint sufficient because they alleged that the sewer system had a defect. We cannot agree that the rote use of magic language from the statute without any supporting factual allegations is sufficient to overcome a plaintiff's burden of pleading in avoidance of governmental immunity. "Michigan is a notice-pleading state." *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011). A complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1). "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

Nowhere in the complaint do plaintiffs describe, even generally, the nature of the sewer defect. The very first description of the defect came in Mr. Radzom's affidavit submitted with plaintiffs' response to the summary disposition motion, but the circuit court did not consider that evidence. The allegations in the complaint are so broad that they sound in *res ipsa loquitur*—because sewage backed up on my property, there must be a sewer defect. Plaintiffs made absolutely no attempt to tie the facts they gathered following the sewer event to their claim of defect in the complaint. This left the complaint too broad to reasonably inform the City of the nature of the claim. We do not imply that plaintiffs must plead their sewer event claim with particularity. Indeed, that burden applies only in the narrow category of fraud claims. See *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014). Rather, a brief description of the facts describing the defect to put a governmental agency on notice and to place the remaining allegations in context will suffice.

Plaintiffs' failure to adequately plead their negligence claim in avoidance of governmental immunity is not fatal. MCR 2.116(I)(5) provides that when a court finds dismissal appropriate under MCR 2.116(C)(8), (9), or (10), the court must give the plaintiff the opportunity to amend his or her complaint. Although the City sought summary disposition under MCR 2.116(C)(7), the circuit court essentially ruled under (C)(8) based on the complaint alone. As described in plaintiffs' response to the City's summary disposition motion, they are aware of the nature of the sewer system defect and how it caused the damage to their property. Plaintiffs also have information to support their claim that the City could have learned of the defect had it employed reasonable diligence. Accordingly, permitting plaintiffs to amend their complaint on remand avoids the need to dismiss the negligence claim.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Donald S. Owens

/s/ Elizabeth L. Gleicher